

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Reallocation and Service Rules	)	
for the 698-746 MHz Spectrum	)	GN Docket No. 01-74
Band (Television Channels 52-59)	)	
	)	

To: The Commission

**PETITION FOR CLARIFICATION OR RECONSIDERATION  
OF THE SPECTRUM CLEARING ALLIANCE**

Paxson Communications Corporation (“Paxson”), as a founding member of the Spectrum Clearing Alliance, and pursuant to Section 1.429(a) of the Commission’s rules,<sup>1</sup> hereby submits this Petition for Clarification or Reconsideration (“Petition”) of a portion of the Commission’s *Report and Order* in the above captioned proceeding.<sup>2</sup> Paxson and the Spectrum Clearing Alliance, a group of television broadcasters owning stations authorized to operate on Channels 59-69, have developed a plan for clearing those channels to promote the introduction of new public safety and commercial wireless services in the band, as well as facilitate bidding in the upper 700 MHz auction scheduled to begin June 19, 2002.<sup>3</sup> Directly and through wholly-owned subsidiaries, Paxson owns the largest group of full power television stations in the country and the largest number of stations in the Channel 59-69 band. The Spectrum Clearing Alliance

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<sup>1</sup> 47 C.F.R. § 1.429(a) (2000).

<sup>2</sup> Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, FCC 01-364, GN Docket No. 01-74 (rel. January 18, 2002) (“*Lower 700 MHz Order*”).

<sup>3</sup> See Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Scheduled for June 19, 2002, *Public Notice*, DA 01-2394 (rel. October 15, 2001).

has a growing list of members who represent a significant number of analog stations in the upper 700 MHz band, demonstrating that band clearing through voluntary agreements can occur if allowed to proceed.

By this Petition, Paxson respectfully requests clarification of the Commission's policies regarding band-clearing agreements that result in a broadcaster temporarily relocating from Channels 59-69 to Channels 52-58. Commission policy encourages voluntary agreements that result in clearing broadcasters from the upper 700 MHz band, and the Commission has stated that it will permit agreements that result in an upper 700 MHz broadcaster relocating to a lower 700 MHz channel. The *Lower 700 MHz Order*, however, potentially confuses this clear policy by prohibiting "new" analog broadcast operations on Channels 52-59. ***The Commission should clarify that this rule does not extend to stations that propose analog operations in the lower 700 MHz band in furtherance of Channel 59-69 band clearing agreements.*** This clarification is necessary to effectuate the Commission's band clearing policies and eliminate the uncertainty that the *Lower 700 MHz Order* created.

If the Commission intended to prohibit analog stations clearing the Channel 59-69 band from relocating to Channels 52-58, Paxson accordingly requests that this decision be reconsidered as contrary to (1) the Commission's responsibility to provide interested parties with notice and an opportunity to comment on significant rule changes; and (2) the Commission's admitted statutory mandate to clear Channels 60-69

**I. THE COMMISSION MUST CLARIFY THAT IT DID NOT INTEND TO BAN BAND-CLEARING-RELATED TEMPORARY RELOCATION.**

The Commission has promoted voluntary band clearing agreements between broadcasters located in the 700 MHz band and potential new wireless licensees as a

means of introducing new public safety and commercial wireless services more quickly than otherwise possible.<sup>4</sup> The Commission's band clearing policies were not simply adopted overnight but are the result of a long and thoroughly considered rule making process. As early as 1996, the Commission contemplated the early recovery of Channels 60-69 to reallocate to other services and announced plans to further that effort.<sup>5</sup> The Commission said it would "minimize the number of DTV channels" in the upper 700 MHz band to expedite recovery,<sup>6</sup> and consider "requiring the new licensees to compensate broadcasters."<sup>7</sup> In June 1999, the Commission proposed to allow upper 700 MHz entrants to reach voluntary clearing agreements with incumbent broadcasters.<sup>8</sup> A year later, the Commission affirmed that approach, concluding that "the several statutory purposes involved here are best furthered by enabling voluntary agreements that result in the expeditious and efficient recovery of [the upper 700 MHz band] for the legislatively specified commercial and public safety purposes."<sup>9</sup>

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<sup>4</sup> Service Rules for the 746-764 and 776-794 Bands and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC 476, 534 (2000) ("*First Report and Order*"); *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845, 20860-72 (2000) ("*Upper 700 MHz MO&O*"); *Third Report and Order*, 16 FCC Rcd 2703, 2705, 2717-18 (2001) ("*Third Report and Order*"); *Order on Reconsideration of the Third Report and Order*, FCC 01-258, WT Docket No. 99-168, ¶ 11 (rel. September 17, 2001) ("*Reconsideration Order*").

<sup>5</sup> Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd 10968, 10979-80 (1996).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 10980.

<sup>8</sup> Service Rules for the 746-764 and 776-794 MHz Band, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006, 11056 (1999).

<sup>9</sup> *Upper 700 MHz MO&O*, 15 FCC Rcd at 20868 (2000); see also *Reconsideration Order*, ¶ 11 (citing *First Report and Order*, 15 FCC Rcd at 534; *Upper 700 MHz MO&O*, 15 FCC Rcd at 20860-72; *Third Report and Order*, 16 FCC Rcd at 2703).

Accordingly, the Commission created a regulatory framework to help clear the band. The Commission expressed its “hope that before the end of 2006 additional parts of the band will be cleared as the result of voluntary agreements between broadcasters and licensees.”<sup>10</sup> Following the September 11th terrorist attacks, the Commission stressed the importance of band clearing to public safety services. Chairman Powell stated that clearing agreements would “free spectrum for uses the public deems important – such as public safety, which has become critical in the wake of threats to our nation’s homeland.”<sup>11</sup> The Association of Public-Safety Communications Officials has said that television stations are “blocking public safety access” to the 700 MHz band and told the Commission that “the sooner television stations vacate channels 60-69, the sooner public safety agencies will have the opportunity to utilize the spectrum allocated for public safety.”<sup>12</sup>

In creating this unprecedented regulatory landscape to help bring new public safety and commercial wireless services into operation as quickly as possible, the Commission emphasized that incumbent broadcasters “should be afforded **as much flexibility as possible** to address situations that may be unique to their particular circumstances.”<sup>13</sup> The Commission said that the band-clearing effort was coupled hand-in-glove with its implementation of digital television and noted that its “policy to promote broadcasters’ ability to establish full DTV transmission by allowing **maximum**

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<sup>10</sup> *Upper 700 MHz MO&O*, 15 FCC Rcd at 20862-63.

<sup>11</sup> Commission Chairman Michael Powell, *Public Safety Spectrum*, WASH. POST, Oct. 23, 2001, at A22.

<sup>12</sup> *Third Report and Order*, 16 FCC Rcd at 2709.

<sup>13</sup> *Id.* at 2713 (emphasis added).

**flexibility** in developing viable business plans during the transition period is consistent with many of the objectives for the long-term use of the 700 MHz bands.”<sup>14</sup>

Accordingly, the Commission said that it would allow stations entering into band-clearing agreements to relocate operations to the Channels 52-58 band.<sup>15</sup> The Commission “clarif[ied] that voluntary agreements to relocate temporarily into Channel 52-58 will not be prohibited.”<sup>16</sup> The Commission wisely explained that the public interest benefits of allowing incumbent broadcasters the opportunity to continue operating, while clearing the spectrum for new wireless licensees were “substantial.”<sup>17</sup> The Commission calculated that relocations to the lower 700 MHz band would be “interim in nature” and would “provide more options for clearing incumbents from Channels 59-69.”<sup>18</sup> The Commission concluded that it would review requests to relocate band-clearing stations to the lower 700 MHz band on a case-by-case basis.

It is not clear whether the Commission’s *Lower 700 MHz Order*, which generally prohibits new analog channel allotments in the lower 700 MHz band,<sup>19</sup> preserves the prior decision to allow band-clearing broadcasters to relocate to the lower 700 MHz band. The Commission noted, in footnote 144, that the group of analog construction

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<sup>14</sup> *First Report Order*, 15 FCC Rcd at 533 (emphasis added).

<sup>15</sup> *Third Report and Order*, 16 FCC Rcd at 2718.

<sup>16</sup> *Id.* at 2705.

<sup>17</sup> *Id.* at 2718.

<sup>18</sup> *Id.* at 2717.

<sup>19</sup> *Lower 700 MHz Order*, ¶ 44. The Commission based this decision on its twin statutory responsibilities of (1) reclaiming broadcast spectrum for new services; and (2) promoting a swift and efficient DTV transition. In implementing its ban on new analog operations in the Channel 52-59 band, the Commission required that all pending Channel 52-59 allotment petitions be amended to specify core-channel operations or face dismissal. The Commission also required that all applications for construction permits specifying analog operations on Channels 52-59 be

permits for Channel 52-59 subject to its new rule “may . . . include requests for . . . a replacement channel for channels in the Upper 700 MHz Band (*i.e.* channels 60-69),”<sup>20</sup> leaving unclear whether the Commission intended to modify its band-clearing policies.

To preserve the benefits of band-clearing agreements that the Commission identified in the *Third Report and Order*, the Commission must promptly clarify that it did not intend to eliminate relocation to the lower 700 MHz band as an option for band-clearing stations. Misinterpretation of the Commission’s intention with regard to relocations would seriously diminish band-clearing opportunities with little commensurate benefit. Any confusion regarding the status of the Commission’s relocation policy also will undermine the Commission’s efforts to facilitate the introduction of new public safety and commercial wireless services by adding uncertainty to the already complex negotiations that are necessary to clear the band.

The Spectrum Clearing Alliance is working aggressively to clear stations from the 700 MHz band, but the Commission must provide the certainty necessary to accomplish this task. The Commission should, therefore, act expeditiously to clarify that it did not intend to undo its relocation policy when it issued a general prohibition of new analog operations in the Channel 52-59 band.

**II. ALTERNATIVELY, THE COMMISSION SHOULD RECONSIDER ANY INTENTION TO RESTRICT BAND-CLEARING AGREEMENTS THAT REQUIRE RELOCATION TO ANALOG CHANNELS 52-59.**

To the extent that the Commission did intend to reverse its band-clearing policies and ban relocation to the lower 700 MHz band, Paxson urges immediate

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amended to specify either in-core analog or Channel 52-59 digital operations or face dismissal. *Id.*, ¶ 45.

<sup>20</sup> *Id.*, ¶¶ 40, 44 & fn.144.

reconsideration. The Commission established well-reasoned band-clearing policies pursuant to an extensive proceeding.<sup>21</sup> There have been no intervening events since the adoption of these policies that would warrant reversal. Voluntary band-clearing allows the Commission to achieve numerous important public interest benefits without increasing the number of stations that must be cleared from the Channel 52-69 band. Due to a concern that disruption could indefinitely postpone band clearing and its benefits, Paxson urged the Commission in comments filed in this proceeding to delay issuance of the *Lower 700 MHz Order* until clearing the upper 700 MHz band was more settled.<sup>22</sup> Given the potential policy reversal represented by footnote 144, these concerns may have been justified.

As a procedural matter, it would be inappropriate for the Commission to reverse in an ambiguous footnote a band-clearing policy rendered pursuant to an extensive notice-and-comment proceeding.<sup>23</sup> As Paxson has shown, the Commission established in the *Third Report and Order* that it would not oppose relocation from the upper to the lower 700 MHz band. That decision was not challenged by any petition for reconsideration or court and therefore became a final Commission policy. The Commission does not need to be reminded that when it changes its rules and policies, it must give interested parties adequate notice and opportunity to comment.<sup>24</sup> Neither the

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<sup>21</sup> Service Rules for the 746-764 and 776-794 Bands and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168; e.g. *supra*, note 5.

<sup>22</sup> See Reply Comments of Paxson Communications Corporation, GN Docket No. 01-74, filed June 4, 2001, at 3-5.

<sup>23</sup> See *Qwest Corp. v. FCC*, 252 F.3d 462, 467 (D.C. Cir. 2001) (citing *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1990)) (ambiguous footnote is insufficient to give interested parties adequate notice).

<sup>24</sup> *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either

*FNPRM* nor the *Lower 700 MHz Order* gives the notice or explanation for the Commission to reverse its prior policy of allowing temporary relocation in furtherance of Channel 60-69 band-clearing agreements. Therefore, any attempt to revise the temporary relocation policy in the *Lower 700 MHz Order* is procedurally unsound.

The *NPRM* that preceded the *Channel Lower 700 MHz Order* was released just two months after the *Third Report and Order* and gave no indication that the Commission was reconsidering its relocation policy.<sup>25</sup> Moreover, the *Lower 700 MHz Order* does not mention the *Third Report and Order* or the possibility of prohibiting relocation pursuant to band-clearing efforts. Instead, the *Lower 700 MHz Order* discusses only the fate of Channel 52-59 analog operations that were proposed during two filing windows, the last of which closed on July 17, 2000.<sup>26</sup> Thus, neither the *FNPRM* or the *Lower 700 MHz Order* suggest that the Commission intended to overturn its relocation policy.

In the *Third Report and Order*, the Commission determined that the benefits of maintaining broadcast service, creating additional band-clearing opportunities, and speeding the pace of clearing Channels 60-69 outweighed any added difficulties that

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with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .” (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“*Greater Boston*”))). The *Greater Boston* court went on to explain that an agency must “indicate[ ] that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”

<sup>25</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Notice of Proposed Rulemaking*, 16 FCC Rcd 7278, 7289-92 (2001) (“*NPRM*”). The *Third Report and Order* was released January 23, 2001, and the *NPRM* was released March 28, 2001.

<sup>26</sup> *Lower 700 MHz Order*, ¶¶ 40-41, 44-45.

relocation presented in clearing the lower 700 MHz band.<sup>27</sup> The Commission did not reweigh these burdens and benefits in the *Lower 700 MHz Order*, and instead discussed only the potential burdens created by additional incumbent broadcasters on Channels 52-59.<sup>28</sup> Moreover, although the Commission noted the potential difficulties created by adding “new” analog allotments in the Channel 52-59 band,<sup>29</sup> it did not acknowledge that relocation to the lower 700 MHz band is preferable to continued incumbent occupation of Channels 59-69 – an irrefutable preference given the Commission’s admitted statutory duty to ensure that Channels 60-69 are cleared promptly.<sup>30</sup> The Commission should not treat band-clearing stations that relocate to Channels 52-58 as “new.” Allowing relocation will not add to the number of stations to be cleared from the Channel 52-69 band but will facilitate the Commission’s mandate to clear the upper 700 MHz band expeditiously for new public safety and wireless uses. Allowing such relocation, at worst, simply shifts an immediate clearing problem to one that is more distant.

Eliminating relocation as a band-clearing option for Channel 59-69 broadcasters accordingly is unreasonable and contrary to the Commission’s previously stated goals and policies. Without the option of temporary relocation, the Spectrum Clearing Alliance will have less chance of clearing the upper 700 MHz band and facilitating the introduction of new public safety and commercial wireless services – to the detriment of the public interest.

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<sup>27</sup> *Third Report and Order* at 2718.

<sup>28</sup> *Lower 700 MHz Order*, ¶ 44.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, ¶ 184.

## CONCLUSION

In light of the foregoing, Paxson respectfully urges the Commission to clarify that relocation of analog operations to the lower 700 MHz band pursuant to band-clearing agreements is not prohibited by the policies announced in the *Lower 700 MHz Order*. Clarification will provide the certainty necessary to negotiate complex, voluntary band-clearing agreements. Alternatively, if a policy reversal was intended, Paxson urges the Commission to reconsider. The Commission should not eliminate this band-clearing option for Channel 59-69 broadcasters. The Commission has elected voluntary band-clearing agreements as its means of carrying out the admitted Congressional directive to clear the band, and the Commission should not impede policies adopted pursuant to notice and comment proceedings by reversing rules in footnotes that make the agreements more difficult to negotiate or implement. Such policy changes are invalid. Paxson and the Spectrum Clearing Alliance are working to make voluntary band-clearing a reality, and we urge the Commission not to undercut these efforts now.

Respectfully submitted,

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